IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

UNITED STATES OF AMERICA,	*	
vs.	*	
THOMAS H. SACHY,	*	CASE NO. 5:18-CR-48 (CDL)
Defendant.	*	

O R D E R

Defendant asks for a mulligan.[1] Unlike the Rules of Golf, the law does sometimes provide for a "do-over," but not under the circumstances presented here. As explained in the remainder of this order, Defendant's motion to withdraw his guilty plea (ECF No. 297) is denied.

BACKGROUND

Defendant, a medical doctor, was charged with conspiracy to distribute and dispense controlled substances, two counts of unlawful dispensation and distribution of controlled substances resulting in death and serious bodily injury, unlawful dispensation and distribution of controlled substances,

[1] A "mulligan," typically associated with the game of golf, is an informal second chance to perform an action, usually after the first chance went wrong through bad luck or blunder. The origin of the term "mulligan" appears to arise from the surname of a gentleman who was allowed informally to replay a stroke in golf, contrary to the formal rules of golf. Interestingly, several different stories exist as to when (and which) Mr. Mulligan first took advantage of this exception to the rules. *United States Golf Association--Frequently Asked Questions,* https://www.usga.org/history/faq--golf-history-questions-232994f0.html (last visited 5/9/2022).

maintaining a drug involved premises, and a money laundering conspiracy. If convicted on these counts, Defendant faced a possible sentence of 25 years to life imprisonment. Represented by well-experienced counsel, Defendant entered a guilty plea on the first day of his trial to count four of the indictment, which charged him with unlawful distribution of controlled substances in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C). Before accepting the guilty plea, the district judge conducted a model Rule 11 colloquy that established Defendant's guilty plea to be a knowing and voluntary plea supported by an independent basis in fact containing each of the essential elements of the offense. Plea Hr'g Tr. 3:2-16:14, 22:14-23 (June 21, 2021), ECF No. 308.

Seven and a half months after the entry of the guilty plea, Defendant, who had retained new counsel by then, filed a motion to withdraw his plea, claiming that his prior counsel was ineffective and that most of the answers Defendant provided under oath during the plea colloquy were in fact false. Mot. to Withdraw Guilty Plea, ECF No. 297. At the hearing on his motion to withdraw his guilty plea, Defendant and his new counsel suggested that Defendant thought he was going to receive a sentence of time served and be allowed to go home on the day of his plea based upon alleged representations from his then-lawyer regarding an off-hand comment made by the judge assigned to the

case at the time. *E.g.*, Mot. to Withdraw Guilty Plea Hr'g Tr. 13:9-14:13, ECF No. 317. When he was instead taken into custody pending his sentencing hearing, Defendant came to regret his decision to plead guilty. After the hearing on the motion to withdraw his plea and out of an abundance of caution, the judge who accepted the plea stepped aside, and the case was reassigned to the undersigned. In a text order, the Court informed the parties that they had seven days to supplement the record with regard to the motion to withdraw the guilty plea. Text Order (Mar. 28, 2022), ECF No. 316. One day after the supplementation deadline, Defendant's counsel filed a motion to be allowed to file a tardy supplemental brief. The Court granted that motion and set April 12, 2022 as the deadline for Defendant's supplemental brief, with a reply deadline for the Government of fourteen days after service of Defendant's supplemental brief. Text Order (Apr. 6, 2022), ECF No. 319. Defendant filed a supplemental brief, the Government declined to file a supplemental brief, and Defendant's motion to withdraw his guilty plea is now ripe for ruling.

DISCUSSION

Like the Rules of Golf, the law establishes strict parameters for how matters shall proceed. Unlike a friendly weekend game, however, the judge generally cannot make exceptions simply based upon the judge's subjective sense of

grace. Routinely awarding mulligans would make a mockery of the law. For Defendant to obtain a "do-over" under the law, he must be entitled to it based upon well-established legal principles.[2]

The underlying standard for a legal mulligan in the guilty plea context seems at first glance about as subjective as giving your golf buddy a second chance on the first tee on Saturday morning. The Federal Rules of Criminal Procedure permit a defendant to withdraw his guilty plea after the court accepts the plea but prior to sentencing if Defendant can establish a "fair and just" reason for doing so. Fed. R. Crim. P. 11(d)(2)(B). But to prevent this "fair and just" determination from being arbitrary, the law tightens this standard a bit by providing an analytical framework that focuses on the following pertinent factors: (1) whether close assistance of counsel was available to the defendant at the time he made his plea; (2) whether the plea was knowing and voluntary; (3) whether judicial resources would be conserved; and (4) whether the government would be prejudiced if the defendant were allowed to withdraw his plea. *United States v. Cesal*, 391 F.3d 1172, 1179 (11th Cir. 2004) (per curiam), *judgment vacated on other grounds by Cesal v. United States*, 545 U.S. 1101 (2005) (remanding for further consideration in light of *United States v. Booker*, 543

[2] Although the practice of providing mulligans in the recreational setting is prevalent, golf purists find the practice inconsistent with the letter of the rules, which it clearly is, and contrary to the spirit of the rules, which depends on the perspective of the golfer.

U.S. 220 (2005)). Having carefully reviewed the record in light of these factors, the Court finds that Defendant has failed to show that fair and just reasons exist for allowing him to withdraw his guilty plea.

First, although Defendant and his current counsel cast blame upon Defendant's prior counsel, these arguments represent little more than second-guessing of tactical and strategic decisions that were well within the realm of what reasonable lawyers would do under similar circumstances. The Court finds from the present record that counsel provided effective representation and kept Defendant adequately informed as to the proceedings and as to the consequences of entering a plea of guilty. Contrary to Defendant's speculation, Defendant's counsel was well prepared to try his case starting on the day that Defendant's trial was scheduled to begin. The record does not support Defendant's suggestion that he was coerced into pleading guilty because his counsel was not prepared for trial. The Court also rejects any suggestion that Defendant was misled in any way. Defendant had reasonably close contact with counsel throughout the proceedings and was adequately counseled regarding his guilty plea. Counsel fully communicated to Defendant prior to his plea that there were no guarantees regarding the sentence he would receive or whether he would remain in custody pending sentencing. Moreover, the plea deal

that Defendant's counsel was able to negotiate with the Government, which placed a cap of 97 months on his sentence when he faced 25 years to life had he lost at trial, further demonstrates that Defendant's counsel was fully engaged and that he kept Defendant, who was an astute professional, adequately informed. Defendant clearly had close assistance of counsel during the proceedings. This factor weighs heavily against allowing Defendant to withdraw his guilty plea.

Second, the record establishes that Defendant's plea of guilty was knowing and voluntary. The thorough Rule 11 colloquy between the Court and Defendant was a model of clarity. It allowed the Court to clearly ascertain whether Defendant's plea was a knowing and voluntary one entered into after being fully apprised of all of his fundamental rights. Notwithstanding his hope that he was going to be able to enter an *Alford* plea and that he may receive a sentence of time served, Defendant was clearly advised by the Court that the judge would not accept an *Alford* plea and that there were no guarantees as to what Defendant's sentence would be. Plea Hr'g Tr. 18:24-19:20 (rejecting request for *Alford* plea); *id.* at 14:12-15:10 (Court explaining that sentence would be subject to a 97-month cap but that the sentence imposed may be different from estimate given by Defendant's lawyer); *id.* at 22:14-23 (Defendant entering guilty plea following rejection of *Alford* plea and explanation

that the sentence imposed may be different from a lawyer's estimate).

After informing the Court that he understood the Court's explanation, Defendant nevertheless chose voluntarily to plead guilty pursuant to the plea agreement with the Government. It is significant that Defendant's responses to the Court's questions, which allowed the Court to determine he was competent, that his plea was voluntary, and that he understood the consequences of pleading guilty, were made under oath. Although Defendant now disavows those responses, in essence admitting to perjury, the Court does not find his change of heart demonstrates that he was being untruthful at the plea hearing. His responses then were consistent with someone who understood the Court's questions and answered them truthfully. And the circumstances surrounding his plea deal add credibility to his statements then that he knew what he was doing. As mentioned previously, his plea agreement with the Government removed some of the more serious counts and had the effect of reducing the advisory guideline range so that any sentence would be capped at 97 months, instead of the possible 25 years to life that he faced if he was found guilty at trial. While Defendant may have developed second thoughts several months later, he has failed to establish that on the day he pled guilty he did so involuntarily or without a full understanding of the

consequences. In fact, the record establishes just the opposite. This plea by a relatively sophisticated defendant was clearly voluntary and with full knowledge of the consequences.[3]

With these two factors weighing heavily against allowing withdrawal of the guilty plea, the Court's inquiry likely needs to proceed no further. But for the sake of completeness, the Court also finds that the other factors weigh against allowing withdrawal. Judicial resources would not be conserved by allowing a withdrawal of the plea. Similarly, withdrawal of the plea would prejudice the Government. Defendant pled guilty on the first day of his trial. The Government had gone to substantial expense and preparation to get ready for what was expected to be a multiple week, complex jury trial. Members of the community had been summonsed for jury duty. The Court's docket had been cleared of other matters, and the schedules of all personnel involved in the trial had been arranged so that other matters were put on hold or otherwise rescheduled. Allowing the withdrawal of the guilty plea several months after the day it was made would require the trial machine to be restarted, obviously resulting in duplication and

[3] At the hearing on the motion to withdraw the guilty plea, counsel for Defendant raised for the first time an objection to the plea based upon the assertion that it was not supported by an independent basis in fact. Having reviewed the plea colloquy, the Court is convinced that Defendant admitted to sufficient facts during the colloquy to support a finding that the essential elements of the offense to which he pled guilty were established. *See e.g.*, Plea Hr'g Tr. 12:1-13:18.

inefficiencies. Starting over in this manner would require the unreasonable expenditure of additional resources and would likely prejudice the Government. While these factors may not weigh as heavily in the Court's calculus, they do weigh against allowing withdrawal of Defendant's plea.

Neither fair nor just reasons exist for allowing Defendant to withdraw his guilty plea. He apparently thought that he was going to leave the courthouse a free man immediately upon entering his plea. But this subjective belief does not square with the objective record. The plea agreement clearly gives no such indication. The plea colloquy likewise makes it clear that the Court had not decided what his sentence would be, and in fact, could not make that determination until after a presentence report was prepared. And even his counsel, whose testimony the Court found to be credible, emphasized to him that there were no guarantees. Although his counsel relayed the judge's off-hand comment, "sounds like time-served," to Defendant, counsel made clear that he could not count on this comment as a reliable prediction of what his ultimate sentence may be. Nevertheless, Defendant, perhaps filled with hope, voluntarily pled guilty knowing only that a possibility existed that he may get a sentence well below the guidelines range. Although he has not been sentenced yet, his hopes of being released on the day he pled guilty were soon dashed. But dashed

hope does not amount to a fair and just reason to allow withdrawal of a guilty plea. If it did, guilty plea mulligans would be as prevalent in federal district courts as they are on Saturday morning on golf courses throughout the country where recreational players often ignore the rules.

Perhaps recognizing the uphill challenge for withdrawal, Defendant's counsel filed a last-minute supplemental brief that does not supplement her prior motion but in fact adds an entirely new argument. The Court is inclined to disallow it as having been waived. But given Defendant's propensity to change counsel and blame them for ineffectiveness, the Court finds it prudent to address the argument now rather than later. Defendant now maintains that Defendant's plea should be vacated pursuant to *United States v. Davila*, 569 U.S. 597 (2013) based upon the trial judge's alleged violation of Federal Rule of Criminal Procedure 11(c)(1), which states that the judge must not participate in plea agreement negotiations between Defendant and the Government.

For purposes of this Order, the Court assumes that the trial judge who accepted Defendant's guilty plea was informed of the status of the plea negotiations. Remaining informed was particularly appropriate here given that the jury trial was scheduled to begin the same day that these last-minute negotiations started. The trial judge had to plan for jurors

and other court personnel if the negotiations fell through and the trial was to resume. Thus, there was nothing untoward about staying informed regarding the status of the negotiations. As to the ex parte nature of the status report, the record shows that an assistant U.S. Attorney asked Defendant's counsel to report to the trial judge on the status of the plea negotiations. Mot. to Withdraw Guilty Plea Hr'g Tr. 73:7-15. Two of Defendant's lawyers and counsel for another Defendant who would be affected by the plea agreement were present with the judge for the status report. There is no evidence that Government's counsel ever had any type of ex parte conference with the judge. As to the nature of the status report, Defendant's counsel informed the judge that the Government had agreed to dismiss all counts except Count IV and cap Defendant's sentence at 97 months. According to Defendant's counsel, the judge responded cryptically, "[T]hat's a good deal. It sounds like time-served to me." Mot. to Withdraw Guilty Plea Hr'g Tr. 73:20-22. Defendant was not present when the judge made the off-hand comment about "time-served." He relied entirely upon his counsel's report of the comment.

No other discussions with the judge occurred until the Rule 11 colloquy in the courtroom after Defendant decided to plead guilty. Defendant's counsel did inform Defendant of the judge's comment but made clear to Defendant that there was no guarantee

he would receive a time-served sentence. In a recording Defendant took of his conversations with his lawyers regarding his sentencing guidelines range, a lawyer said, "If it's 20 years, you're gonna go to trial." Defendant responded, "If it's more than time served, I'm going to trial." The lawyer responded, "It's gonna be more than time served." Minute Entry Ex. Recording 2 at 00:16:35 to 00:16:43, ECF No. 310. Then, the lawyer said to Defendant, "I told you, when we were sitting in the judge's office, the judge said 'sounds like time served to me.' But he can't guarantee that, I can't guarantee that." *Id.* at 00:17:18 to 00:17:30. Later in the day, while discussing the presentence investigation process, Defendant asked the lawyer, "You're not a mind reader, but you feel you got a message today, though, right? It's good enough for you to shake your head like this. [Pause] That means a lot. I know it's not 100%. I know you can't predict the future, no one can. But you're saying Tom, it looks that way." The lawyer responded, "It looks that way, but there's no guarantee. He could change his mind." *Id.* at 01:39:56 to 01:40:37.

This absence of a guarantee was reiterated by the judge during the Rule 11 plea colloquy. And as previously noted, Defendant was not present at the time of the status report where the off-hand comment was made. Thus, there was never any direct representation by the Court to Defendant until the judge

addressed Defendant in open court during the plea colloquy at which time the judge clearly explained that his sentence would be decided after a presentence investigation had been completed and a presentence report submitted to him.

The record makes clear that the trial judge was simply provided with a status report so that he could manage for the possible trial, which was to begin that very day and for which jurors were already assembled at the courthouse awaiting voir dire. The trial judge did not insert himself into the plea negotiations between the Defendant's counsel and the Government. And his stray limited remark certainly does not rise to the level of coercion or prejudice as contemplated by *Davila.* No reasonable person could have relied upon it, particularly given the explanation provided to Defendant by his counsel and the warnings provided by the judge during the plea colloquy.

In *United States v. Davila,* the Supreme Court, citing Federal Rule of Criminal Procedure 11(h), held that a violation of Federal Rule of Criminal Procedure 11(c) does not require vacatur of the plea if the record shows no prejudice to Defendant's decision to plead guilty. 569 U.S. at 600-01. As indicated previously, the trial judge here did not exhort the Defendant to plead guilty. He did not even make that suggestion to the Defendant. The judge expressed no desire that Defendant plead guilty. And the judge made no representations that

indicated he would be unhappy if the case proceeded to a jury trial. Defendant's counsel simply reported to Defendant an off-hand comment by the judge accompanied by the clear caveat that the comment certainly could not be relied upon. Even construing the evidence in favor of Defendant, the best he has is a representation, which standing alone could lead one to conclude that the trial judge *may* sentence him to time served. But when viewed in the context of the other circumstances, which establish unequivocally that he was told by both his counsel and the trial judge that there was no guarantee as to what his sentence would be, this representation certainly could not be reasonably relied upon. When all of the circumstances are considered (instead of taking one off-hand remark out of context), no prejudice has been shown, assuming that Rule 11(c) even applies to this off-hand remark. Defendant's plea cannot be vacated based upon an alleged violation of Rule 11(c)(1).

CONCLUSION

Just as the golfer must (with limited exceptions) play the course as he finds it and the ball as it lies, Defendant must accept the consequences of his actions.[4] Having entered a knowing and voluntary plea with the benefit of counsel, Defendant does not get a second shot under the circumstances

[4] Rule 1, Rules of Golf (jointly written and administered by the United States Golf Association and The R&A).

presented here. Defendant's motion to withdraw his guilty plea (ECF No. 297) is denied.

IT IS SO ORDERED, this 9th day of May, 2022.

S/Clay D. Land
CLAY D. LAND
U.S. DISTRICT COURT JUDGE
MIDDLE DISTRICT OF GEORGIA